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IN THE

United States Supreme Court

October Term, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR REMAND

June 11, 1979

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Appellee's Brief in Support of The Motion to Dismiss or Remand fails to address the specific points and authorities raised in the Jurisdictional Statement, fails to present accurately the state of the proceedings and pleadings below, and falls short of the burden placed upon it in proving the prerequisites for the remand the Appellee seeks. For these reasons, as more fully explained below, Appellant, Dodson Insurance Group (hereinafter Dodson) requests that the Motion to Dismiss or Remand be denied, that probable jurisdiction be noted, and that the matter be set for full briefing and oral arguments.

POINT I

The Order of the New Mexico Supreme Court Quashing the Writ of Superintending Control and Denying the Writ of Prohibition is a Final Judgment.

At page two of the Jurisdictional Statement Dodson cited five cases in which this Court has unequivocally held that decisions of state courts granting or denying writs, whether writs of superintending control or writs of prohibition, are final judgments or orders subject to review under 28 U.S.C. §1257(2). No contrary authority whatsoever was cited in Appellee's brief.

After unnecessarily explaining the purpose of a writ of superintending control, Appellee attempted to distinguish the five cases by claiming that they deal with prohibition and not with superintending control. This reasoning misses the mark for at least two reasons. First, *Fisher v. District Court of the 16th Judicial District*, 424 U.S. 382 (1976), one of the five cases cited by Dodson in the Jurisdictional Statement, held that a state court decision dealing with a writ of superintending control is a final judgment within the ambit of §1257(2). Thus, even if Dodson had applied only for a writ of superintending control, the denial of that writ would still be a final judgment. Secondly, Dodson did petition the New Mexico Supreme Court for a writ of prohibition. The Petition, as evidenced by the record certified by the New Mexico Supreme Court, is entitled "Petition for Writ of Superintending Control *or in the Alternative for Writ of Prohibition*." (Emphasis Added). Thus, when Appellee admits at page 4 of its brief that a determination as to a lower court's jurisdiction is final and appealable, Appellee thereby also admits that the New Mexico Supreme Court Order from which Dodson now takes its appeal is a final judgment. Dodson sought a writ of prohibition and the Supreme Court of New Mexico refused to grant that writ of prohibition. That refusal is a final judgment.

A case directly on point is *Bandini Petroleum Company v. Superior Court*, 284 U.S. 8 (1931). The appellant in that action applied to an intermediate appellate court and then to the California Supreme Court seeking a writ of prohibition restraining the lower court from enforcing a preliminary injunction. The appellant claimed that the statute, pursuant to which the preliminary injunction was granted, was unconstitutional and

the lower court therefore had no jurisdiction. The California appellate courts denied the writ of prohibition and the appellant then sought review with this Court. The Court had no problem in dealing with the question of jurisdiction.

> "This Court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of §237(a) of the Judicial Code." 284 U.S. at 14.

The further statement on page 4 of the Appellee's brief that the proceeding in the New Mexico Supreme Court had nothing to do with the jurisdiction of the trial court misapprehends and ignores the very document presented to the Supreme Court as the basis for the Writ. Paragraph 4 of Dodson's Petition alleges that the propriety of granting the Writ of Prohibition

> "arises out of actions and proposed actions of the Respondent in excess of his proper and legal jurisdiction in a workmen's compensation suit. The remedy of prohibition will lie for the court is without jurisdiction or is about to exceed it."

Appellee also contends that the New Mexico Supreme Court Order was interlocutory, citing authorities to the effect that final orders must terminate litigation. Appellee again misses the mark. The citation of these authorities was unnecessary and irrelevant to the issue now before the Court. The order on appeal before this Court is the order of the New Mexico Supreme Court, not the order of the trial court. Nothing further remains to be done in the New Mexico Supreme Court case. The original proceeding in the New Mexico Supreme Court on the Petition for a Writ has terminated. The relief Dodson sought has been denied. The order of the New Mexico Supreme Court unquestionably is final.

Dodson recognizes that the *trial* court has yet to conduct a trial on the merits, but the fact has no bearing on whether the New Mexico *Supreme Court* order is final. *See Hudson Distribution, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, footnote 4 (1964). In *Fisher v. District Court of the 16th Judicial District, supra, Pan American Petroleum Corp. v. Superior Court of Delaware in and for Newcastle County*, 366 U.S. 656 (1961), *Madruga v. Superior Court*, 346 U.S. 556 (1954) and *Bandini*

Petroleum Company v. Superior Court, supra, additional matters remained to be decided before final judgment could be entered on the merits of the controversy. This did not prohibit this Court from noting jurisdiction to hear those appeals. In short, writs fall within a distinct category yet Appellee failed to refer the Court to any cases analyzing the propriety of hearing an appeal from the denial of a writ.

Without reference to any authority, Appellee states at page 6 of its Brief that this Court should consider the underlying subject matter of the order in determining the presence of jurisdiction. This approach cannot stand. In the cases just cited by Dodson, the underlying subject matter of the trial court's order did not enter into a determination of whether the highest court in the state entered a final judgment in the independent, original proceedings seeking a writ. For example, in *Bandini, supra*, the only judgment with which the Court was concerned was the judgment that

> "dealt with the jurisdiction of the superior court on the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, with all questions of fact, or with questions of law which would appropriately be raised upon the facts adduced in the trial of the case in the Superior Court, as a court competent to entertain the suit, we are not concerned on this appeal." 284 U.S. at 14.

Even if Appellee could properly insist that this Court should consider the substance and underlying subject matter of the order, Appellee improperly portrays the underlying dispute. The underlying dispute is not a run of the mill discovery order in which a federal district court examines the scope and extent of discovery; the argument here revolves around the state court's order that Dodson *pay* for the Plaintiff's discovery, whatever that discovery may be. Since the order to pay for the discovery does not depend upon who obtains a favorable judgment on the merits, the trial court has reached a final decision. A federal appellate decision under 28 U.S.C. §1291 concerning the scope and extent of discovery cannot and should not be equated with a

state supreme court decision determining that the trial court had jurisdiction to command a party to expend certain monies in support of its opposing party's claim.

Appellee cites cases demonstrating that the requirement of finality remains a policy embodied in §1257. Dodson does not now contend, nor has it ever contended, that §1257 requires anything but a final judgment or order. The point raised by Dodson and not fully answered by Appellee, is that the denial of the Writ of Superintending Control and the denial of the Writ of Prohibition was just such a final judgment.

The case cited by Appellee to support its contention that Dodson would have a right to appeal that portion of a judgment taxing costs simply does not stand for that proposition. *Ruidoso State Bank v. Brumlow*, 81 N.M. 379, 467 P. 2d 395 (1970) states that mere pecuniary loss fails to confer the right of appeal on a party. The party must also be aggrieved in the legal sense. Dodson reiterates that as the prevailing party at the trial, even though compelled to pay for Plaintiffs' discovery, Dodson might not be aggrieved on the legal sense. If, as here, the constitutional issues cannot be preserved for appeal, the order should be considered a final judgment. *North Dakota State Board of Pharmacy v. Snyder Drug Stores, Inc.*, 414 U.S. 156, 162 (1973).

Appellee cites authority to the effect that certain types of interlocutory orders are not appealable. Again, Dodson does not disagree. What is now before the Court, however, is not an interlocutory order; it is a final decision of the New Mexico Supreme Court denying a writ of prohibition and quashing a writ of superintending control.

In short, Appellee cites no authority for the proposition that a decision by the New Mexico Supreme Court denying a writ of prohibition and quashing a writ of superintending control is not final. The general cases Appellee cites are not on point and do not deal with the specific issues now presented to the Court. No relevant authority is cited to contradict the cases put forth by Dodson in the Jurisdictional Statement.

POINT II

The Constitutional Issue was Raised and Considered and the Decision of the Supreme Court Had the Effect of Upholding the Validity of the Statute.

Appellee does not dispute that Dodson raised and argued the constitutional questions. Appellee does devote several pages of its Brief to the contention that a state court must have decided the constitutional issues before the Court can entertain jurisdiction. Dodson has never contended to the contrary. What Dodson has contended and demonstrated in its Jurisdictional Statement is that the necessary effect of the decision of the New Mexico Supreme Court was to uphold the constitutionality of the statute. Jurisdictional Statement pp. 7-9.

Appellee cites *Durley v. Mayo*, 351 U.S. 277 (1956) and *Stembridge v. Georgia*, 343 U.S. 541 (1952) to show that if the judgement *might* have been based on a non-federal ground, the Court has no jurisdiction to hear an appeal, but even in the *Durley* case, the Court expressed limitations on that concept.

> "It is likewise well settled that if the independent [State] ground was not a substantial or sufficiant one, it will be presumed that the state court based its judgment on the law raising the federal question and this court will then take jurisdiction." See *Williams v. Kaiser*, 323 U.S. 471, 478 (1945).

Whether an independent and substantial state ground exists is a question of state law. *Durley v. Mayo, supra*, at 283-284. Appellee referred the Court to no state law, but merely surmised that the New Mexico Supreme Court decided to postpone the consideration of the constitutional issues until after an appeal is taken.

No substantial or sufficient state ground exists to explain the quashing of the writ. Dodson demonstrated at pages 8 and 9 of its Jurisdictional Statement through pertinent state cases that if the New Mexico Supreme Court had found that the statute contravened the Constitution, then the granting of a writ of prohibition would be mandatory. Dodson contended that the payment of the discovery costs pursuant to court order while awaiting an appeal would constitute a temporary taking of property proscribed by the due process and equal protection clauses of the Constitution. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). Since a writ will issue if a constitutional violation is presented, by dismissing the writ the New Mexico Supreme Court

necessarily concluded that there was no violation of the Constitution, temporary or otherwise. The necessary effect of the dismissal of the writ was to uphold the validity of the statute pursuant to which the trial court entered it order.

This Court may not now assume that the New Mexico Supreme Court erroneously concluded that it could preserve the constitutional issues by remanding the action to the trial court. *Maguire v. Tyler*, 8 Wall. 650, 665 (1869). *Neilson v. Lagow*, 12 How. 98, 110 (1851). These two early Supreme Court cases were cited with approval in *Williams v. Kaiser,supra*. Such a remand would promote the constitutional violation, albeit perhaps temporary in nature, instead of correcting the error.

Lynch v. New York, ex rel. Pierson, 293 U.S. 52 (1934) affirms that the decision of the New Mexico Supreme Court need not have expressly stated the reason for its holding; it is only necessary that the record disclose that "the judgment as rendered could not have been given without deciding [the constitutional issues]." 293 U.S. at 54. The writ could not be denied without deciding the constitutional issues adversely to Dodson. See Jurisdictional Statement pp. 7-9. *Street v. New York*, 394 U.S. 576 (1969) and the other cases cited at page 7 of the Jurisdictional Statement establish that the judgment need not expressly state the decision if the necessary effect of the decision is to uphold the validity of the statute.

Because there is no showing of any viable, substantial or sufficiant state grounds, and because the necessary effect of the decision by the New Mexico Supreme Court was to uphold the validity of the statute, the record fully discloses that the federal question was decided by the New Mexico Supreme Court.

POINT III

The Representations by Plaintiffs That They Will not Seek the Discovery Ordered by the Trial Court Fail to Render the Case Moot.

Appellee devotes seven pages of its Brief to a discussion of principles of mootness. Again, Dodson does not contend that the doctrine of mootness does not exist. The only question is whether the doctrine of mootness applies to the facts of this

case.

Specifically, the issue to be decided by the Court is whether the representations found at page 19 and 20 of Appellee's brief are sufficient to moot out the case despite the continuing existence of a court order compelling Dodson to underwrite Plaintiffs' discovery. Within the last year the Court has considered this point and has concluded that such a representation. even one made in good faith, does not moot out an appeal. A voluntary withdrawal from a program at issue

> "in no way mooted the Court of Appeal's prior determination that the program was being operated in violation of federal law. *See United States v. W.T. Grant Co.*, 345 U.S. 629.
>
> By granting the defendants motions to dismiss, as it was bound to do if the case was indeed moot, the District Court rendered the entire proceeding a nullity. There is no longer any judgment binding on the defendants to prevent them from returning to the old program. *And, while the defendants' good faith representation that they had no intention of doing so might properly have lead the District Court to deny injunctive relief, Hecht Company v. Bowles*, 321 U.S. 321, *it could not operate to deprive the successful Plaintiff, and indeed the public, of a final and binding determination of the legality of the old practice. United States v. W.T. Grant Co.*, supra, 345 U.S., at 632. *Quern v. Mandley*, 436 U.S. 725, Footnote 7 (1978). (Emphasis Added).

Appellee relies heavily on *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The reference to selected portions of the *DeFunis* opinion, however, ignores the portions of that decision relevant to the present issue.

> "There is a line of decisions in this court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' *United States v. W.T. Grant Co.*,345 U.S. 629, 632 (1953); *United States v. TransMissouri Freight Association*, 166 U.S. 290, 308-310 (1897); *Walling v. Helmerich & Payne, Inc*,

323 U.S. 37, 43 (1944); *Gray v. Sanders*, 372 U.S. 368, 376 (1963); *United States v. Phosphate Export Association*, 393 U.S. 199, 202-203 (1968). *These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of the unilateral change in the admissions procedures of the law school.* For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance that 'there is no reasonable expectation that the wrong will be repeated.' *United States v. W.T. Grant Co., supra*, 345 U.S. at 633. Otherwise, 'the Defendant is free to return to his old ways.' *Id.* at 632, and this fact would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled.'" 416 U.S. at 318. (Emphasis added).

The withdrawal by Plaintiffs in the instant case was voluntary and unilateral so the line of cases just cited would apply. Further, there is a reasonable expectation that the wrong will be repeated, despite the good faith assurances to the contrary. The only reason that Plaintiffs have given for voluntarily ceasing their insistence on the discovery is that they wish to proceed to trial as soon as possible. Appellee's position disregards the New Mexico Supreme Court stay of proceedings entered in April. That Writ of Prohibition, which includes a stay and a reinstatement of the discovery order, is appended hereto at page 17, *infra*. As soon as this appeal is determined by this Court, Plaintiffs will then obtain their trial setting and will no longer have any reason for abandoning their claim to this discovery. Furthermore, Plaintiffs have abandoned only the claim of right as to the precise discovery sought in their motion. They have not abandoned their claim as to any other discovery they may seek in the future. In fact, in view of the complex, underlying factual dispute it is highly probable that they will seek additional discovery at Dodson's expense.

This situation is analogous to *Carpenters Union v. NLRB*, 341 U.S. 707 (1951) in which the Court observed that the conduct sought to be proscribed was "merely a sample of what

might be repeated elsewhere if not prohibited. *The underlying dispute between Petitioners and Watson's has not been shown to be resolved."* 341 U.S. at 715. (Emphasis added). The underlying dispute between Dodson and Plaintiffs has not been resolved. The very conduct which Plaintiffs have presently abandoned with regard to one deposition might very will be repeated as to other depositions. This would be very similar to *Brooks v. Flagg Brothers, Inc.*, 63 F.R.D. 409, 413 (C.D. N.Y. 1974) in which the district court condemned a party for attempting to keep practices from judicial scrutiny by quick settlements or apologies.

In addition to the probability that this conduct will be repeated again, the appeal presents an issue of great public importance not only to Dodson, but also to the State of New Mexico and any person or entity involved in workmen's compensation lawsuits. All workmen's compensation actions in New Mexico are resolved through litigation in district courts. Dodson and many other carriers continue to write workmen's compensation policies in the State of New Mexico. When the egregious violations of fundamental principles of due process of this case are multiplied by the hundreds, if not thousands, of workmen's compensation claims filed in New Mexico each year, the ramifications assume added importance. The voluntary cessation by Plaintiffs of their unconstitutional efforts to obtain discovery at Dodson's expense cannot at this juncture moot out a question of significant public importance. *DeFunis v. Odegaard, supra.*

Appellee states at page 20 of its Brief that a party pursuing a particular claim may moot the issue by dropping that claim completely. That is apparently not the law in New Mexico, for Plaintiffs attempted to drop their claim and to withdraw their proposed discovery, but that attempt was struck down by the New Mexico Supreme Court in Cause No. 12422. Therefore, despite the attempt to withdraw the motion, the motion has not been withdrawn and the New Mexico Supreme Court has restored the order compelling Dodson to finance the Plaintiff's discovery.

Moreover, the authorities Appellee cited regarding withdrawal of claims do not support Appellee's contention. Wright, Miller and Cooper refer to *W.T. Grant, supra*, and

squarely indicate that there is no unilateral right to withdraw claims at any time. 13 Wright, Miller and Cooper, *Federal Practice and Procedure*§ 3533 at 271, 282 and Vol. 7 §2364. *See also* Federal Rule of Civil Procedure 41(a) and Supreme Court Rule 60. *Kimball v. Kimball*, 174 U.S. 158 (1899) and *Mills v. Green*, 159 U.S. 651 (1895) point out that external influences or actions by an appellant may moot an appeal, but unilateral actions by an appellee do not have the same effect.

Appellee's reliance on *Lunz v. Preiser*, 524 F.2d 289 (2d Cir. 1975) is misplaced. Besides the fact that the case is questionable authority in view of *W.T. Grant, DeFunis* and other such cases, it is also distinguishable on the grounds that the plaintiff in that action obtained the relief he sought from the defendants that he had sued. The *Lunz* case more properly stands for the proposition that when a defendant provides a plaintiff with the relief he seeks, the case is resolved. A contrary situation is presented here. Plaintiffs have not obtained the relief they seek; Plaintiffs have not abandoned their claim that they may be entitled to additional or further discovery at Dodson's expense; Dodson continues to refuse to submit to their demands; and the underlying dispute between Dodson and Plaintiffs remains unresolved.

The lengthy discourse on mootness by Appellee fails to assist his claim that this case is moot. Dodson concedes the existence of a doctrine of mootness; cases such as *W.T. Grant, supra,* however, demonstrate that the doctrine of mootness do not apply to this case.

POINT IV

The Appeal Presents Substantial Federal Questions Appropriate for Resolution by This Court

Point III of the Brief in Support of Motion to Dismiss or to Remand argues that the petition to this Court should be dismissed because it presents no substantial federal question. In this section, Appellee cites general principles concerning the substantiality of a federal question with which Dodson has no disagreement, but which fail to address the specifics of the instant case. Moreover, Appellee confuses the question of substantiality with the issue of mootness as shown by the summary

statement in Appellee's Brief, p. 21, and reliance on *Little v. Brown*, 134 U.S. 547 (1890), pp. 23-24 of Appellee's Brief.

Appellee cites *Debacker v. Brainard*, 396 U.S. 28 (1969) and *United States Fidelity and Guaranty Co. v. State of Oklahoma*, 250 U.S. 111 (1919) but these cases plainly signify that the federal question, i.e., the constitutionality of NMSA §52-1-34 1978, must be drawn in question. There is no doubt that this was done. Appellee's use of *Abrams v. Van Schaick*, 293 U.S. 188 (1934) is factually inapposite since *Abrams* involved a situation in which a dispute had not yet arisen as opposed to the present situation in which an order of the court is in effect and compels payment from Dodson.

Zucht v. King, 260 U.S. 174 (1922) and *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902) stand for the proposition that the Court will not hear federal questions already determined by prior decisions. As Dodson pointed out in its Jurisdictonal Statement, pp. 12-13, the issue now before the Court has not been previously decided. Nowhere did Appellee respond to this point. At no time has Appellee contended that the questions raised are foreclosed by prior decisions of this Court. Appellee quite simply, does not address the issue of whether the four questions presented at page 4 of the Jurisdictional Statement are substantial.

Dodson presently is under court order to expend money in financing Plaintiffs' lawsuit. Dodson's efforts to vindicate its position that the order violates fundamental constitutional rights are now impugned as dilatory tactics despite the fact that the outcome of this appeal will have a substantial bearing on how this and other workmen's compensation lawsuits in New Mexico will proceed. Rather than discuss whether the questions raised on page 4 of the Jurisdictional Statement are substantial as defined in *Zucht, supra*, Appellee chooses to malign Dodson's motive. In addition to constituting improper argument, Appellee's attack *ad hominem* leaves untouched Dodson's contention that the questions are, indeed, substantial.

POINT V

The Court Should Leave Intact the Stay Granted by the New Mexico Supreme Court.

Following the filing of the Notice of Appeal, in a separate proceeding before the New Mexico Supreme Court, No. 12422, Dodson obtained a Writ of Prohibition. That Writ of Prohibition stayed all proceedings in the trial court pending the resolution of this appeal from action No. 12345. If this Court now remands the case for trial, it will overrule an order not presently before the Court.

The "most compelling justification...to upset an interim decision...would be to protect this court's power to entertain a petition..." *New York v. Kleppe*, 429 U.S. 1307, 1310 (1979). Such a justification does not exist in this case. The New Mexico Supreme Court entered its stay order to preserve the appellate jurisdiction of this Court. The dissolution of the stay would erode rather than preserve the Court's jurisdiction. 28 U.S.C. §1651 grants the Court jurisdiction and power to take such steps as are necessary to preserve the rights of the parties pending final determination of the cause, but the same statute does not give the Court authorization to erode its own jurisdiction. *c.f. Meredith v. Fair*, 83 S. Ct. 10 (1962).

Appellee contends that jurisdiction of the entire cause has not been transferred to the Supreme Court. Brief pp. 25-26. If that is true, then the only matter over which this Court presently has jurisdiction is the order denying the Writ of Prohibition. All other matters would remain in the New Mexico courts. The court having jurisdiction over the remainder of the cause, the New Mexico Supreme Court, has already stayed the proceedings. This court would have no jurisdiction to overrule the stay ordered by the New Mexico Supreme Court.

The court in *Magnum Import Company v. Coty*, 262 U.S. 159 (1923) made it perfectly clear that motions of this sort should first be presented to the lower court for determination. After Dodson obtained the stay of proceedings, Plaintiffs failed to petition for rehearing. If Plaintiffs or Appellee wish to have the New Mexico Supreme Court ruling overturned, they may petition for rehearing, file an appeal or petition for a writ of certiorari. They may not do indirectly what they did not do directly.

The decision of the New Mexico Supreme Court to stay the proceedings below was made after receiving briefs and hearing arguments of counsel on two separate Writs of Prohibition. The

New Mexico Supreme Court, being well versed in New Mexico law, being fully aware of the various equities involved, and being fully cognizant of the pendency of this appeal, prohibited the trial court from acting any further and entered a stay order pending the determination of this appeal.

Because the New Mexico Supreme Court is more familiar with this case, its determination that the stay was warranted is deserving of great weight. To dissolve the stay previously entered by the New Mexico Supreme Court would require "an extraordinary exercise of judicial power that only the most compelling considerations could warrant." *Cunningham v. English*, 78 S. Ct. 3 (1957). Interim determinations of lower courts are disturbed only upon "the weightiest considerations". *O'Rourke v. Levine*, 80 S. Ct. 623 (1960). Since the lower court is "best and most convieniently able to exercise the nice discretion needed,...the determination of the application will ordinarily be left to it." *Virginia Railway Company v. United States*, 272 U.S. 658, 671 (1926). Great caution is the rule and the stay should be reversed only upon a showing of exceptional circumstances. *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973). Appellee has presented no such circumstances.

That other state courts have chosen in the past to remand cases for trial pending appeals, as Plaintiffs suggest, is of no assistance in this instance. The state court in this case, the New Mexico Supreme Court, has considered that alternative and has rejected it. Petitioners now improperly request the United States Supreme Court to overrule a decision by the New Mexico Supreme Court involving New Mexico trial procedure.

Appellees' prayer that this Court direct the New Mexico Supreme Court to vacate its Writ of Prohibition is unnecessary. As soon as this appeal is decided, the stay of proceedings contained in the Writ of Prohibition will expire of its own terms.

CONCLUSION

This case meets the requirements of 28 U.S.C. §1257(2). The order is final. The case is not moot. Substantial federal questions are presented. The Motion to Remand is not properly

before the Court, and even if properly presented, it fails to present adequate grounds for overturning the stay entered by the New Mexico Supreme Court. Dodson requests that jurisdiction be noted and that Appellee's motions be denied.

Respectfully submitted.

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Of Counsel

I hereby certify pursuant to Supreme Court Rule 33(3)(a) that on the Eleventh day of June, 1979 I caused three copies of the foregoing to be hand delivered to Ronald Segel, 600 First Plaza, Albuquerque, New Mexico; The Honorable James A. Maloney, Bernilillo County Courthouse, Albuquerque, New Mexico; and Harold Parker, 1300 Bank of New Mexico Building, Albuquerque, New Mexico, and that all parties required to be served have been served.

Mark B. Thompson, III
P.O. Box 2168
Albuquerque, New Mexico 87103
Attorney for Appellant

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

DODSON INSURANCE GROUP,
Insurer,

Petitioner,

vs.

No. 12422

THE HONORABLE JAMES A. MALONEY,
Judge of the District Court,
Second Judicial District,

Respondent

ALTERNATIVE WRIT OF PROHIBITION

T O THE HONORABLE JAMES A. MALONEY
Judge of the District Court
Second Judicial District
Bernalillo County Courthouse
Albuquerque, New Mexico 87102

GREETINGS:

WHEREAS, a verified Petition for Writ of Superintending Control, or, in the alternative, for Writ of Prohibition (a copy of which is attached hereto), having been filed in the above-captioned matter; and

WHEREAS, the facts and laws set forth in said petition demonstrate that an alternative writ of prohibition should issue; and

WHEREAS, Petitioner has no plain, speedy, or adequate

remedy at law; and

NOW, THERFORE, you are prohibited from proceeding in Cause No. CV-78-06242 on the docket of your court until such time as the appeal to the United States Supreme Court concerning the order entered on December 14, 1978, in Cause No. CV-78-06242 is finally determined by the United States Supreme Court, and you are further ordered to vacate the order entered March 12, 1979, in violation of the stay ordered by the trial court on March 1, 1979; in excess of the trial court's jurisdiction; in violation of the doctrines of estoppel and law of the case; and in violation of the rules of procedure. You are further directed to show cause on the 28th day of March, 1979, why this writ should not be made permanent.

Petitioner's brief shall be filed on or before April 4, 1979.

Respondent's brief shall be filed on or before April 11, 1979.

Oral argument will be had on the matter on Wednesday, April 18, 1979, at 9:00 A.M., in the Supreme Court Hearing Room, Supreme Court Building, Santa Fe, New Mexico.

Service of this Alternative Writ of Prohibition with a copy of the Petition attached shall be made on Respondent and counsel for the real parties in interest by delivering copies to Respondent, counsel for Plaintiffs below, and Atkinson & Kelsey, co-counsel for the New Mexico Restaurant Association.

WITNESSETH the Honorable Dan Sosa, Jr., Chief, Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 21st day of March, 1979.

Rose Marie Alderete

Clerk of the Supreme Court of New Mexico

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO
Wednesday, April 18, 1979

No. 12,422

DODSON INSURANCE GROUP,

Petitioner,

vs. Original Proceeding on Superintending Control or Prohibition

HON. JAMES A. MALONEY,

Respondent.

This matter coming on for consideration by the Court upon the alternative writ with copy of petition attached, response to writ and briefs of counsel, and the Court having considered the matter and having heard oral argument and now being sufficiently advised in the premises;

NOW,THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the alternative writ heretofore issued in the above entitiled cause on March 21, 1979, be and the same is hereby made permanent.

ATTEST: A TRUE COPY
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico